NO. 84632-4

SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE CENTER FOR ENVIRONMENTAL LAW AND POLICY, AND SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF ECOLOGY, AND EASTERDAY RANCHES, INC.,

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION, NORTHWEST DAIRY ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

STATE OF WASHINGTON'S AND DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

This is a water case involving interpretation of the provision in the Groundwater Code that exempts from water right permitting the use of groundwater for stock-watering. Five Corners Family Farmers, Scott Collin, the Center for Environmental Law and Policy and Sierra Club (collectively referred to as Appellants) appeal a superior court order granting summary judgment to Easterday Ranches, Inc. (Easterday), Washington State and the State Department of Ecology (hereafter collectively referred to as State or Ecology), and a number of intervenor associations on interpretation of RCW 90.44.050. The superior court found the statutory language unambiguous and concluded that the statute's plain meaning is that "permit–exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." CP 23. The superior court's ruling should be affirmed.

II. ISSUE PRESENTED FOR REVIEW

Is the exemption from groundwater permitting for stock-watering purposes contained in RCW 90.44.050 limited to a maximum of 5,000 gallons a day or to only those stock-watering uses associated with rural homesteads?

III. STATEMENT OF THE CASE

A. Statement of Facts

Appellants' declaratory judgment action seeks an interpretation of the scope of the exemption from groundwater permitting for stock-water purposes under RCW 90.44.050. CP 1108. Appellants' action arose in the context of Easterday's proposal to establish a 30,000 head cattle feedlot in Franklin County. CP 1105-1106. Easterday plans to rely on the exemption from groundwater permitting for stock-watering purposes for a portion of its stock-watering needs and on an existing water right (the "Pepiot" water right) for the remainder of its feedlot water needs. CP 974. The Pepiot water right transfer authorizes Easterday to use 316 acre-feet per year of water at the feedlot, of which 66 acre-feet per year is for stock drinking and 250 acre-feet per year is for stock cooling, dust control, and associated feedlot uses. CP 974. The Pepiot water right transfer will not impair existing rights. CP 974. The Pepiot water right transfer is not at issue in this litigation. CP 793.

Easterday acquired the Pepiot right after Ecology informed Easterday that the agency did not think all of Easterday's proposed water uses would come within the phrase "stock-watering purposes." CP 466-467. The State takes the position that stock-watering generally includes use of water for livestock drinking and for maintenance of animal health

and welfare (such as the use of water for livestock feeding, cleaning equipment used to feed or milk livestock, cleaning the livestock and the buildings they occupy, and misting livestock for cooling purposes) but does not include uses such as irrigation, dust control, and water needs for processing milk or meat products.

Appellants include property owners who reside in the vicinity of Easterday's proposed feedlot and allege that Easterday's groundwater use may, in the future, interfere with their ability to use their own groundwater rights and obtain water from their wells. Appellants' Br. at 9; CP 1100-1102. Hydrogeology experts for Ecology and Easterday predict that Easterday's use of groundwater will not interfere with the withdrawals of water from any of Appellants' groundwater wells.[1] CP 1049, CP 402-403.

B. Prior Decisions

The same legal issue over interpretation of the stock-watering exemption arose about ten years ago in a case involving a dairy located in Yakima County. *DeVries v. Dep't of Ecology*, Pollution Control Hearings Board (PCHB) No. 01-073 (Summary Judgment Order) (Sept. 27, 2001).[2] In that case, the Department of Ecology took the position that the

[1] Ecology's assessment of possible impacts to area groundwater was performed when the agency reviewed the project under the State Environmental Policy Act (SEPA), RCW 43.21C. CP 402.

[2] A copy of the PCHB's Summary Judgment Order can be accessed at http://www.eho.wa.gov/searchdocuments/2001%20archive/pchb%2001-073%20summary%20judgment.htm, last visited September 3, 2010.

exemption from groundwater permitting for stock-watering purposes was limited to a maximum quantity of 5,000 gallons per day. CP 627-649. The Pollution Control Hearings Board agreed with Ecology and ruled that the exemption from groundwater permitting for stock-watering purposes was limited to 5,000 gallons per day. *DeVries,* No. 01-073, at 4-14. The case was settled by the parties before any reviewing court considered the issue. CP 466.

In 2005, the Attorney General considered the same question in a formal Attorney General's opinion. The Attorney General concluded that the statute is unambiguous and applied the plain meaning rule to conclude that permit-exempt groundwater withdrawals for stock-watering purposes are not limited to any maximum quantity. Op. Att'y Gen. 17 (2005), at 3-7.

C. Proceedings Below

Appellants filed their declaratory judgment action in June 2009. CP 1098-1109. In December 2009, the superior court denied defendant Easterday's motion to dismiss on various threshold issues, including standing, exhaustion of administrative remedies, laches, and an argument that the case was barred by the Land Use Petition Act (LUPA). CP 821-

822.[3] In April 2010, the superior court heard summary judgment motions on the subject of Appellants' declaratory judgment action: whether the exemption from permitting for withdrawals of groundwater for "stock-watering" purposes is subject to a quantity or other type of limit.

The superior court found the statutory language unambiguous and concluded that the statute's plain meaning is that "permit–exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." CP 23. Appellants appealed this ruling and sought direct review from the Supreme Court. Appellants' petition for direct review remains pending.

D. Relevant Principles of Washington Water Law

To establish or "appropriate" a water right in Washington, a person is required to obtain a permit from the Department of Ecology, unless the proposed use is statutorily exempt from the permit requirement.[4] RCW 90.03.290; RCW 90.44.050. All water rights, including rights established as "permit-exempt rights" under RCW 90.44.050, are subject to other principles of Washington water law, including the Prior Appropriation and beneficial use doctrines. RCW 90.44.050 (permit-exempt groundwater

[3] Among other issues, Easterday has cross-appealed the superior court's rulings on standing and failure to appeal under LUPA. The State does not join in Easterday's cross-appeal.

[4] The permit requirement was enacted in 1917 for surface water rights and 1945 for groundwater rights. *See* RCW 90.03.250 (formerly RCW 90.20.010); RCW 90.44.050.

right is a "right equal to that established by a permit issued under the provisions of this chapter"); *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The Prior Appropriation Doctrine means that once a right has been established or appropriated, the right holder is entitled to receive all of his/her water before any more "junior" water rights – that is, water rights established later in time. *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 467, 852 P.2d 1044 (1993) (the appropriated right is perpetual and operates to the exclusion of subsequent claimants). "Beneficial use" is the basis, measure, and limit of all water rights. *See Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589–590, 957 P.2d 1241 (1998).

> Application of water to "beneficial use" and "perfection" of an appropriative right are terms of art, with well-established meanings in western water law. Water must actually be put to a beneficial use before a water right vests. "The principle that water must be used for a beneficial purpose is a fundamental tenet of the philosophy of water law in the West." *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997). "Beneficial use" refers to both the type of use *and the measure and limit of the water right. Id.*; *Department of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 237, 814 P.2d 199 (1991).

Id. Finally, "the owner of a water right is entitled to the amount of water necessary for the purpose to which it has been put..." *Dep't of Ecology v. Grimes*, 121 Wn.2d at 468. The quantity of water associated with a water

right is based on the principle of "reasonable use," which requires water use to be reasonably efficient and not wasteful. *Id.* at 469-474.

IV. STANDARD OF REVIEW

Under CR 56(c), a party moving for summary judgment must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In this case, although the question before the court arose in the context of a specific proposed cattle feedlot, disputed facts associated with the potential for harm to Appellants from Easterday's pumping of groundwater do not need to be resolved because the question presented on summary judgment and in this appeal is a pure question of law. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993).

An appellate court reviews summary judgment decisions de novo. *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007). Where construction of statutes is concerned, the error of law standard applies. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

The court may give some deference to an agency interpretation of a statute within the agency's special expertise, provided the statute is ambiguous and the agency interpretation has been consistent. *Id.* An agency interpretation that conflicts with a statute will not be accorded

deference because the meaning and purpose of a statute is ultimately for a court to determine. *Id.*

Attorney General opinions, although not controlling, are entitled considerable weight. *Bates v. City of Richland*, 112 Wn. App. 919, 933, 51 P.3d 816 (2002). If the Legislature does not amend a statute after it has been interpreted in an Attorney General's opinion, the opinion is entitled to even greater weight. *Washington Educ. Ass'n v. Smith*, 96 Wn.2d 601, 606, 638 P.2d 77 (1981).

V. ARGUMENT

A. Summary of Argument

RCW 90.44.050 exempts from permitting four categories of groundwater use: (1) any stock-watering use; (2) lawn and non-commercial garden use not exceeding one-half acre; (3) domestic use not exceeding 5,000 gallons a day; and (4) industrial use not exceeding 5,000 gallons a day. In response to a request for a declaratory judgment, the Superior Court ruled that "RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity." CP 23.

The superior court's ruling was correct and should be affirmed. The statute is plain on its face. The statute manifests the Legislature's

intent to not restrict by quantity the amount of groundwater that may be used for stock-watering purposes without obtaining a permit. No language in the rest of the statute, nor any language in related statutes, changes this conclusion.

Neither of Appellants' two alternative readings of the statute is reasonable. By its plain terms, the statute does not limit permit-exempt stock-watering uses to 5,000 gallons a day. Also by its plain terms, the statute does not limit permit-exempt stock-watering uses to only those associated with rural homesteads. Because neither of Appellants' two alternative readings is reasonable, the statute is unambiguous and its plain meaning governs.

Because the statute's meaning is plain, neither legislative history nor historic agency interpretations should be considered. However, even if they are considered, the "legislative history" and historic agency interpretations offered by Appellants do not support either of their interpretations of the statute.

At its core, Appellants' argument amounts to an objection to the policy choice made by the Legislature when it exempted from permitting *any* groundwater use for stock-watering purposes. While permitting of new groundwater uses serves important policies that include protecting existing rights, the public interest, and the resource as a whole, permit-

exemptions also advance important policies such as minimizing administrative burdens and expenses to allow for the efficient development of certain new water rights. Moreover, permit-exempt water rights are subject to the same requirements as rights established through permits. As a result, they are part of the water rights priority system, making them subject to limitation by a senior right holder during times of shortage to ensure the senior user can exercise his or her right, and by Ecology in water short basins when new groundwater uses are restricted to conserve the resource.

The superior court's ruling should be affirmed. It is the Legislature that should determine whether Appellants' policy concerns require modification of the stock-watering exemption from permitting.

B. The Plain Language Of RCW 90.44.050 Makes Groundwater Withdrawals For Stock-Watering Purposes Exempt From The Groundwater Code's Permit Requirement And Includes No Maximum Quantity Limit On Such Withdrawals

1. Where there is only one reasonable interpretation of a statute, the statute's meaning is "plain."

In determining the meaning of statutory language, courts interpret a statute as a whole "in the context of the entire act" where it appears. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Campbell & Gwinn, LLC,* 146 Wn.2d at 9 (quoting *Estate of Lyons v. Sorenson,* 83

Wn.2d 105, 108, 515 P.2d 1293 (1973)). If a statute's meaning is plain on its face, then effect must be given to its "plain meaning" as expressing the Legislature's intent. *Campbell & Gwinn, LLC,* 146 Wn.2d at 9–10. "[P]lain meaning is . . . discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11.

If, after considering "all that the Legislature has said," the statute is not plain (but rather is ambiguous), the court applies additional rules of statutory construction to resolve the ambiguity and determine what the statutory language means. *Id.* at 11-12. A statute is not ambiguous merely because it is subject to more that one conceivable interpretation. *Agrilink Foods, Inc. v. State Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Rather, ambiguity depends on the existence of more than one reasonable meaning. *State v. Keller,* 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

2. The plain language of RCW 90.44.050 makes groundwater withdrawals for stock-watering purposes exempt from the Groundwater Code's permit requirement and includes no further limit on such withdrawals.

RCW 90.44.050 makes it plain that groundwater withdrawals for stock-watering purposes are exempt from the Groundwater Code's permit

requirement and includes no further limit on such withdrawals. RCW 90.44.050 reads in its entirety as follows:

> After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, *That any withdrawal of public groundwaters for stock-watering purposes*, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, *is and shall be exempt from the provisions of this section*, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

RCW 90.44.050 (emphasis added).

The framework of RCW 90.44.050 provides for a general rule, followed by three provisos. The framework is as follows: (1) the general rule requires a permit for withdrawals of public groundwaters that began

after June 6, 1945; (2) the first proviso excepts specific categories of groundwater withdrawals from the general rule that a permit is required; (3) the second proviso allows Ecology to require persons making withdrawals excepted from the permit requirement to provide information about the means and amounts of such withdrawals; and (4) the third proviso gives persons, authorized by the statute to withdraw less than 5,000 gallons per day without a permit, the option to obtain a water right through the generally applicable permit process.[5] *Id.* Op. Att'y Gen. 17 (2005), at 3.

The first proviso of RCW 90.44.050 makes it plain that groundwater withdrawals for stock-watering purposes are exempt from the Groundwater Code's permit requirement and are not subject to a maximum quantity limit of 5,000 gallons a day. The relevant language exempts from the statute's permit requirement:

> *[A]ny withdrawal of public groundwaters for stock-watering purposes*, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area,

[5] The original statutory language in RCW 90.44.050 has, but for few amendments, remained largely intact since its enactment in 1945. CP at 404-406. The statute has been amended three times: 1947, 1987, and 2003. CP 407-415. In 1947, the Legislature amended RCW 90.44.050 to add the third proviso that authorizes the option of securing a water right permit for certain water uses that otherwise would be exempt. CP 407-410. In 1987, the Legislature amended the statute for mainly housekeeping purposes, such as changing the reference to Ecology's predecessor agency (the Supervisor of Hydraulics) to the "department." CP 411-413. Most recently, the Legislature in 2003 amended the first proviso in RCW 90.44.050 to include "or as provided in RCW 90.44.052," to make the exemption for single or group domestic uses apply to the Whitman County cluster housing pilot program. CP 414-415.

> or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, *is and shall be exempt from the provisions of this section* . . .

RCW 90.44.050 (emphasis added). Based on its ordinary language, natural reading, the rules of grammar, and standard canons of statutory construction, the first proviso exempts from permitting: (1) any withdrawal for stock-watering purposes; (2) any withdrawal for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area; (3) any withdrawal for single or domestic group uses in an amount not exceeding 5,000 gallons a day (or as provided in RCW 90.44.052); or (4) any withdrawal for an industrial purpose in an amount not exceeding 5,000 gallons a day. Op. Att'y Gen. 17 (2005), at 3-4.

Of these four categories, the third (single or group domestic use) and the fourth (industrial use) are expressly limited to withdrawals that do not exceed 5,000 gallons a day. The second category (watering a lawn or a noncommercial garden) is not limited to 5,000 gallons a day, but does contain an "acreage limit." By contrast, the first category (stock-watering purposes) contains no language limiting the amount of the withdrawal

through a gallon per day limit, an acreage limit, or any other statutory limit on the exemption.[6]

Thus, the grammatical structure of this proviso indicates that, of these four categories, there is no 5,000 gallons a day limit for permit-exempt groundwater withdrawals for stock-watering purposes. Op. Att'y Gen. 17 (2005), at 4. Further, the language used with the other three exemptions makes it evident that the Legislature was aware of how to limit permit-exempt withdrawals. In two places, it provided 5,000 gallons a day restrictions on domestic and industrial uses. In another place, it applied an acreage restriction on lawn and noncommercial garden uses. In contrast, it chose not to include such limits with respect to the stock-watering exemption. Op. Att'y Gen. 17 (2005), at 4.

Based on the Legislature's deliberate use of a 5,000 gallon limitation and acreage limitation with the other three exempt uses, it must be presumed that the Legislature did not intend to place any limitation on exempt stock-water withdrawals. *Restaurant Development, Inc. v. Cananwill, Inc.,* 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (words cannot

[6] This is not to say that stock-watering rights established under the authority of the exemption are unlimited. As with any type of water right, permit-exempt stock-watering rights may not impair more senior rights, may use only a reasonable amount of water necessary for their purpose and may not waste water. *Postema v. Pollution Control Hearing Bd.*, 142 Wn.2d 68, 80-98, 11 P.3d 726 (2000) (new appropriations cannot impair existing water rights); *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 472, 852 P.2d 1044 (1993). See Section III.D *supra.*

be added to a statute where Legislature has chosen not to use them); *City of Kent v. Beigh,* 145 Wn.2d 33, 45, 32 P.3d 258 (2001) ("where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.") (citations omitted); *Johns v. Erhart,* 85 Wn. App. 607, 611, 934 P.2d 701 (1997) (use of different language with similar subjects indicates different legislative intent); Op. Att'y Gen. 17 (2005), at 6-7.

3. Neither of Appellants' alternative interpretations of the statute is reasonable.

Appellants offer two alternative interpretations of the statute in support of their contention that the exemption is limited. First, they contend that permit-exempt groundwater use for stock-watering purposes is part of a "bundle of uses" (stock-watering combined with domestic and lawn and noncommercial garden watering) that are collectively limited to 5,000 gallons a day. Appellants' Br. at 17-18. Second, Appellants contend that the exemption is limited to the number of animals that would be found on a small, rural homestead, and that an operation on the Easterday scale should be considered an industrial use, not a stock-watering use, with its permit-exempt groundwater use limited to 5,000 gallons per day. Appellants' Br. at 42-44. Neither interpretation has

support in the words of the statute. Neither interpretation is thus reasonable.

a. The statute does not create a single "bundle of uses."

The language of the statute does not support Appellants' first alternative reading. The first three categories of use listed in the statute (stock-watering, lawn/gardens, and domestic) are not identified as a single "bundle of uses" cumulatively limited to 5,000 gallons per day. *See* Appellants' Br. at 17-18. The statute expressly identifies four separate categories of uses (stock-watering, lawn or non-commercial garden, domestic, and industrial). The statute places quantity limits on the third and fourth categories (domestic and industrial), an acreage limit on the second category (lawn or non-commercial garden), and no limit on the first category (stock-watering). Nothing in the statute's plain language supports Appellants' "bundle of uses" reading.

Appellants contend the statute is structurally ambiguous, citing, for illustrative purposes, the following example: "I eat apples, bananas, and pears that aren't rotten." Appellants' Br. at 26. Appellants contend that because their sentence is susceptible to either the interpretation that the writer avoids *only* rotten pears or that the writer avoids rotten apples,

rotten bananas, *and* rotten pears, the subject statute is likewise susceptible to two interpretations.

The structure of Appellants' sentence, however, is not parallel to the structure of the subject statute. The portion of the permit exemption statute to which Appellants point provides no qualification with respect "stock-watering purposes," a distinct qualifying phrase with respect to "lawn or...a non-commercial garden" ("not exceeding one half acre in area"), and matching, but different from the first, qualifying phrases with respect to both "single or group domestic uses" and "industrial purpose" ("in an amount not exceeding 5,000 gallons a day"). If Appellants' sentence is altered to make it parallel to the subject statute ("I eat apples, bananas *that are yellow*, *plums that aren't rotten*, and pears that aren't rotten"), both sentences are then susceptible to only one reasonable meaning: that both writers did not intend to qualify the first subject ("apples" or "stock-watering withdrawals") with the qualifying phrases related to the third and fourth subjects.

b. The language of the statute does not limit stock uses to those associated with rural homesteads; nor does it classify large scale stock use as industrial.

The statute also does not support Appellants' second alternative interpretation—that the exemption for stock-watering purposes is limited

to the number of animals that would be found on a small, rural homestead, such that an operation on the Easterday scale is an industrial use, limited to 5,000 gallons per day. Appellants' Br. at 42-44. Rather than qualify the type of stock-watering use by including phrases such as "stock-watering associated with a rural homestead," "stock-watering unless for a large-scale, commercial operation," or "stock-watering except if used at a feedlot," the statute includes no qualifications at all.[7] Appellants' alternative interpretation is unreasonable because it would require the court to read language into the statute that does not exist. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); Op. Att'y Gen. 17 (2005), at 6.

Moreover, while Appellants rely extensively on *Campbell & Gwinn,* nowhere in that opinion does the court determine that domestic permit-exempt uses are available only for rural homesteads. To the contrary, the opinion upheld the use of the domestic exemption to supply water to subdivisions (so long as their use does not exceed 5,000 gallons a day). *Campbell & Gwinn, LLC,* 146 Wn.2d at 21. Thus, Appellants' interpretation depends upon an internally inconsistent reading of RCW 90.44.050 that infers that the Legislature intended to make the stock-water exemption available only to rural homesteads while not imposing the same

[7] That the Legislature is familiar with the term "feedlot" is apparent given the term's use in other statutes. *See, e.g.,* RCW 90.22.040 (legislative policy of retaining adequate surface water to allow riparian stock drinking does not apply to stock-watering related to feedlots); RCW 16.58 (providing for feedlot licensing and certification).

limit on the domestic exemption. Appellants' rural homestead interpretation is not reasonable.

c. Neither the second nor the third proviso operates to place quantity or size limits on permit-exempt stock-water uses.

The second and third provisos do not create an ambiguity regarding the scope of the stock-watering exemption, let alone support either of Appellants' alternative interpretations.

The second proviso states:

> PROVIDED, HOWEVER, That the department from time to time may require the person or agency making *any such small withdrawal* to furnish information as to the means for and the quantity of that withdrawal: . . . .

RCW 90.44.050 (emphasis added). Appellants contend that this proviso's reference to "any such small withdrawal" confirms their non-grammatical reading of the stock-watering exemption. Appellants' Br. at 20.

As a threshold point, no language in the second proviso actually limits the amount of water that may be withdrawn without a permit for stock-watering purposes. Instead, the second proviso provides that even though certain categories of groundwater use are exempt from the statute's permit requirement, Ecology may nonetheless require information regarding such water use. In this context, the phrase "any such small withdrawal" is merely the Legislature's short-hand reference back to the

categorical exemptions listed in the preceding proviso of RCW 90.44.050. Op. Att'y Gen. 17 (2005), at 6.

Appellants argue that stock-water use by an operation such as Easterday's cannot be considered a "small withdrawal" under a plain language analysis. Appellants' Br. at 20-21. But, even if individual water rights for stock-watering purposes are not limited to a particular quantity, the Legislature may consider stock-water use in general small, either in comparison to other types of groundwater withdrawals, or in comparison to all groundwater withdrawals as a whole.[8] Accordingly, the use of "small withdrawal" in the second proviso does not undermine the plain language of the stock-watering exemption, much less imply that the 5,000 gallon limit should be engrafted where the Legislature omitted it. *Id.*

Moreover, when the Court of Appeals examined this statute to consider whether groundwater use associated with a commercial nursery is authorized under the industrial use permit exemption, the court had no problem characterizing "any amount of water for livestock" as a "small withdrawal." *Kim v. Pollution Control Hearings Bd.*, 115 Wn. App. 157,

[8] By one estimate, in 1945 statewide stock-water uses represented less than 6 percent of all irrigated agricultural water uses. CP 302. Contemporary figures indicate that statewide stock-water uses now represent only about 1% of statewide irrigated agricultural uses. *Id.* For an individual use comparison, Easterday's projected water use "involves less than the amount of water required for a single 'crop circle' commonly used in Eastern Washington agriculture." CP 331.

160, 61 P.3d 1211 (2003). The court described the permit exemptions as follows:

> The overall scheme of this statute is to require a permit except for certain "small withdrawals." *The 1945 legislature defined a "small withdrawal" as (1) any amount of water for livestock*, (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less, (3) not more than 5,000 gallons per day for domestic use, and (4) not more than 5,000 gallons per day "for an industrial purpose."

Kim, 115 Wn. App. at 160 (emphasis added). The *Kim* decision recognized that the Legislature provided for a stock-water exemption with no quantity limit, even in the context of the Legislature's reference to "small withdrawal" in the second proviso.[9] *Id.*

Turning to the statute's third proviso, it states:

> PROVIDED, FURTHER, That at the option of *the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day*, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

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[9] Appellants point to the Supreme Court's characterization of the statute in *Postema*, 142 Wn.2d at 89 ("RCW 90.44.050 allows domestic and stock watering uses of up to 5,000 gallons without a permit"), as an indication that the Supreme Court has addressed this issue. Appellants' Br. at 18. While descriptions of the exemption in both *Kim* and *Postema* are dicta, *DCR, Inc. v. Pierce Cy.*, 92 Wn. App. 660, 683 n.16, 964 P.2d 380 (1998) (citations omitted), the *Kim* statement was made in the context of the court examining the scope of the exemption statute (albeit a different category) and concluding that the statute's meaning is plain, *Kim*, 115 Wn. App. at 163, whereas the *Postema* statement was made in an entirely different context (determining how to measure impacts to surface water bodies from new groundwater uses in hydraulically connected groundwater bodies) and with no reference to a plain meaning analysis.

RCW 90.44.050 (emphasis added). The third proviso gives a person who withdraws up to 5,000 gallons per day of groundwater for domestic or industrial use the option of seeking a permit. The reference to withdrawals "not exceeding 5,000 gallons a day" merely defines the category of permit-exempt water user that may elect to seek an optional permit.[10] Nothing in this proviso imposes a 5,000 gallons per day *quantity limit* on permit-exempt stock-water withdrawals.

Appellants' approach to the second and third provisos in the statute would require the court to conclude that the Legislature's method of limiting one of four categories of water use exempt from permitting was through oblique references in two subsequent provisos, ignoring the plain words of the operative proviso. Such an interpretation is not reasonable. Op. Att'y Gen. 17 (2005), at 6-7.

d. The last antecedent rule lends additional support for the plain reading of the statute.

The last antecedent rule provides that unless a contrary intent appears in the statute, qualifying words and phrases refer to the last antecedent (i.e., the subject or object immediately preceding the qualifying

[10] Although the reason the Legislature gave only two of the four categories of permit-exempt withdrawals the option of pursuing a permit does not change the statute's interpretation, it is certainly possible that the Legislature concluded those categories (domestic and industrial) would be more frequently relied upon and therefore more likely to want to obtain a permit.

word or phrase). *In re Sehome Park Care Ctr., Inc. v. State of Dep't of Revenue,* 127 Wn.2d 774, 781–82, 903 P.2d 443 (1995). The presence of a comma before the qualifying phrase is one example of contrary intent and is recognized as evidence that the qualifying language is intended to apply to all antecedents instead of only the immediately preceding one. *Id.*

In the case of RCW 90.44.050, "in an amount not exceeding 5,000 gallons a day" immediately follows "single or group domestic uses." No comma is found between "single or group domestic" (the antecedent) and "in an amount not exceeding five thousand gallons a day" (the qualifying phrase). The statute reads:

> That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, *or for single or group domestic uses in an amount not exceeding five thousand gallons a day*, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day . . . .

RCW 90.44.050 (emphasis added). Notably, commas immediately follow "stock-watering purposes" and "watering of a lawn or of a noncommercial garden not exceeding one-half acre in area," but do not follow the next phrase ("single or group domestic uses"). The absence of a comma between the domestic use phrase and the 5,000 gallons a day qualifying phrase means that the 5,000 gallon a day limitation operates to qualify

only "single or group domestic uses" (the last antecedent). The last antecedent rule means that the 5,000 gallons per day qualifier does not reach back to qualify the earlier antecedents (stock-watering or lawn and noncommercial garden water use).[11]

Similarly, because "industrial purpose" and "in an amount not exceeding five thousand gallons a day" are not separated by a comma, the last antecedent rule provides that the 5,000 gallons a day qualifying phrase in that portion of the sentence applies only to the last antecedent (industrial purpose). Thus, the last antecedent rule means that the 5,000 gallons a day qualifier on industrial uses also does not reach back to qualify the earlier antecedents (stock-watering or the lawn and noncommercial garden water use).

Appellants argue that the State's case rests solely on the last antecedent rule and the absence of a comma. Appellants' Br. at 22. Appellants misstate the State's discussion (in its summary judgment briefing below) of the last antecedent rule. CP 485 n.3.[12] Rather than rely on the rule as the sole authority for its position, the State recognizes that

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[11] The last antecedent rule was not new to the 1945 Legislature, as it has been a longstanding rule of statutory construction employed in Washington, including before the stock-water permit exemption was enacted. *See, e.g., State v. Bailey,* 67 Wash. 336, 338, 121 P. 821 (1912); *State ex rel. Blakeslee v. Clausen,* 85 Wash. 260, 274, 148 P. 28 (1915); *State v. Hart,* 136 Wash. 278, 283, 239 P. 834 (1925); *Judson v. Associated Meats & Seafoods,* 32 Wn. App. 794, 799-800, 651 P.2d 222 (1982).

[12] Neither the last antecedent rule nor the absence of a comma is relied on in the 2005 Attorney General's opinion.

the last antecedent rule should not be applied inflexibly nor be binding in all instances. *In re Smith,* 139 Wn.2d 199, 205, 986 P.2d 131 (1999); CP 485. Importantly, the last antecedent rule is not offered by the State to contradict a natural or contextual reading of the statute. It is offered to corroborate the plain reading of the statute. Thus, the rule is not offered as the definitive answer in this case – but rather because it lends additional support for the plain reading of the statute.

C. Neither The Purported Legislative History Nor The Historic Agency Interpretations Supports Appellants' Interpretation Of The Statute

Appellants devote significant portions of their brief to discussing purported legislative history and historic agency materials that they contend support their interpretation of the statute. Appellants' Br. at 27-39. As "legislative history," Appellants point to reports that pre-date the 1945 enactment of the Groundwater Code (1944 United States Department of Interior and 1942 Washington State Planning Council reports, CP 563-587, 589-618), to news accounts and third party accounts of the 1945 enactment of the Groundwater Code (February 1945 Seattle Post Intelligencer article, CP 776-777; June 1945 Spokane Spokesman Review article, CP 177; Washington Association of Cities March 1945 legislative bulletins, CP 55, 559), and to agency reports following the 1945 enactment of the Groundwater Code (Department of Conservation

biennial reports from 1944-46, 1948, 1950, CP 621-625, 444-452, 453-463).

Appellants also point to Ecology's position in the 2001 *DeVries Dairy* Pollution Control Hearings Board case, CP 627-649, and to an Ecology official's summary of adjudication rulings that confirmed water rights for stock-watering uses. CP 651-657.

In light of the express language of RCW 90.44.050, and based on the actual context and content, Appellants' reliance on these materials is misplaced.

1. Appellants' purported legislative history or "background facts of which the Legislature was presumably aware" should not be considered. If they are considered, they do not support Appellants' interpretation of the statute.

This case presents pure legal issues regarding the construction of RCW 90.44.050. Because the statute is unambiguous, the Court need not look beyond the language in the statute. *Campbell & Gwinn, LLC,* 146 Wn.2d at 12. Even if the Court determines that the statute is ambiguous, any extrinsic evidence considered by the Court must qualify as legislative history. *See, e.g., Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

Legislative history includes findings contained in the preamble to a bill, section-by-section commentary adopted by one or both houses of the

Legislature, and legislative bill reports. *See* Philip A. Talmadge, *A New Approach To Statutory Interpretation In Washington*, 25 Seattle U.L. Rev. 179, 203 (2001) (findings in bill's preamble of greatest utility in discerning legislative intent); *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992) (House bill analysis appropriately considered to discern legislative intent); *Biggs v. Vail*, 119 Wn.2d 129, 134–136, 830 P.2d 350 (1992) (Final Legislative Report appropriately considered to discern legislative intent). Legislative history does not include documents such as news accounts, agency reports, and association bulletins. While these materials may provide insight into what their authors were thinking around the time of the statute's enactment, they rarely shed light on the *Legislature's* intent. *See Satterlee v. Snohomish Cy.*, 115 Wn. App. 229, 236, 62 P.3d 896 (2002) ("contemporaneous history" in the form of *newspaper articles* supporting a different position than previous court holdings related to interpretation of the state constitution disregarded by the court).

Because these documents do not constitute actual legislative history, Appellants' argument hinges on a reference to a statutory construction treatise in *Campbell & Gwinn*. Appellants' Br. at 15, 30 n.19. Appellants focus in particular on the Singer quote that provides: "background facts of which judicial notice can be taken are properly

considered as part of the statute's context because presumably the Legislature also was familiar with them when it passed the statute." *Campbell & Gwinn, LLC*, 146 Wn.2d at 11 (quoting Norman Singer, *Statutes and Statutory Construction*) (additional citations omitted). The court should decline the Appellants' invitation to apply this rule in this case.

In this case, Appellants' use of extrinsic material would create a huge exception to the plain meaning rule that legislative intent is to be discerned solely from the language of the statute and related statutes, within the context of the entire statute, with resort to legislative history only in the event of ambiguity. *Campbell & Gwinn, LLC,* 146 Wn.2d at 11-12. Appellants do not cite any cases in which a court has relied on this phrase to justify consideration of the types of materials offered by Appellants. Indeed, the only case appearing to apply this phrase is *State v. Riofta*, 166 Wn.2d 358, 368, 209 P.3d 467 (2009), in which the Supreme Court took notice that a federal statute's enactment was apparently the impetus behind an amendment to state law. This is far different than taking judicial notice of, and attributing legislative intent to, news accounts, agency reports, or association bulletins.

Even if such extrinsic documents are considered by the Court either as "legislative history" or as "background facts with which the

Legislature was presumably familiar," the documents presented by Appellants do not stand for the proposition that the stock-watering exemption is limited to 5,000 gallons a day or to small homestead operations. The 1945 Association of Washington Cities' bulletins do not address the groundwater permit exemption, let alone the specific category of stock-watering. CP 551 (mid-session bulletin describing bill in general terms, no mention of permit requirement or exemptions from permitting); CP 559 (post-session bulletin describes bill in general terms, references permit required "in order to use or appropriate any undergroundwaters[,]" but makes no mention of exemptions).

Appellants point to a 1942 draft report (of the Washington State Planning Council) and a 1944 final report (of the Department of Interior, Bureau of Reclamation), both of which addressed water supply needs in rural settings. Appellants' Br. at 29-32; CP 569-570, 603. Ecology agrees that the reports studied water supply needs of rural settlers in the Columbia Basin in the 1940s and identified household, lawn and garden, stock, farm product processing, and fire suppression as the water needs in such a setting. CP 569, 603. The reports, however, lack any discussion of how these water supply needs would be met or whether the State should require a permit for these uses or exempt them from a permitting

requirement. Moreover, there is no evidence that the 1945 Groundwater Code was enacted in response to these reports.

Finally, the news accounts cited by Appellants describe in general terms the enactment of the Groundwater Code, including its permit requirement. However, the accounts do not purport to address every aspect of the recently enacted statute. The Seattle Post Intelligencer account is just two sentences long. CP 777. Significantly, the agency director is quoted in the Spokesman Review article as describing the effect of the law as exempting "from administrative control the withdrawal of water for any purpose where the quantity is less than 5,000 gallons a day." CP 177. While the reference to 5,000 gallons a day would seem to support Appellants' contention, the excerpt hardly deserves weight. Its general point (that any type of use is exempt) is at odds with the clear statutory language that exempts from permitting only four listed categories of use. Even if the content of the statement did not raise questions, an agency director's statement should be entitled little, if any, deference. *Cf. Western Telepage, Inc., v. City of Tacoma,* 140 Wn.2d 599, 611, 998 P.2d 884 (2000) (given reluctance to discern legislative intent from testimony of single legislator, statement of lobbyist of even less utility).

2. Historic agency interpretations do not support Appellants' arguments.

Because the statute is not ambiguous, the Court need not look beyond the language in the statute. *Campbell & Gwinn, LLC,* 146 Wn.2d at 12. If the Court finds the statute ambiguous, the Court may consider agency interpretations in determining the meaning of the statute. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). However, where agency interpretations have not been consistent, the Court should not assign weight to any one particular interpretation, but should simply interpret the statute de novo. *Skamania Cy. v. Columbia River Gorge Comm'n,* 144 Wn.2d 30, 43, 26 P.3d 241 (2001) (agency interpretation of ambiguous statute not entitled deference where interpretation is inconsistent with the agency's prior administrative practice). Here, the agency's interpretation varied at different times, so no single interpretation should be given any more weight than any other interpretation.

a. Historic agency statements on the scope of permit-exempt stock-watering use are not entitled deference because they have not been consistent.

The agencies charged with implementing the Water Code (Ecology and its predecessor agency, the Department of Conservation and Development) have interpreted the stock-water permit exemption in at

least four different ways since it was enacted in 1945. First, an agency report from 1946 reflects two different readings of the statute. In one place in the report, it appears the agency may have considered three of the four categories of permit-exempt uses (stock-water, domestic, and lawn and noncommercial garden) as coming under a single 5,000 gallons a day limit. CP 625 (original page 46). At another place in the same report, however, the agency describes the new statute as requiring permits for any new water use in excess of 5,000 gallons a day, i.e., inferring that each type of use is entitled to use up to 5,000 gallons a day without a permit. CP 625 (original page 47). A 1950 agency report suggests that the statute places no quantity limit on stock-watering. CP 456-457. In 2001, the agency took the position that the statute imposed a single cumulative 5,000 gallons a day limit on all four categories of permit-exempt uses (stock-water, domestic, lawn and noncommercial garden, and industrial). CP 640-641. Finally, in 2005, the agency viewed the statute as placing no quantity limit on stock-watering. CP 466.

In summary, even if the Court finds the statute ambiguous, these varying historic agency interpretations counsel against giving weight to any single agency position.

b. The position taken by Ecology in the *DeVries* PCHB matter is not entitled any special deference.

Appellants place much emphasis on the fact that, in 2001, Ecology advanced the position that the exemption from groundwater permitting for stock-watering purposes was limited to 5,000 gallons a day. CP 640-641. Appellants' Br. at 38-39. CP 627-649. Again, this point is not determinative. First, as shown above, the statute is not ambiguous, and therefore there is no need to defer to an agency interpretation. Regardless, as discussed above, the agency has held a variety of views regarding whether the statute limits permit-exempt stock-watering to 5,000 gallons a day. This counsels against according deference to any particular view. *Skamania Cy.,* 144 Wn.2d at 43. Moreover, when this Court addressed a similar situation (varying interpretations by the Department of Ecology in the context of public water supply perfection requirements), the Supreme Court ultimately interpreted the statutes de novo, rather than giving weight to a previously long-standing position of the agency. *Theodoratus,* 135 Wn.2d 582. In *Theodoratus,* Ecology changed its position over time from issuing water right certificates based on "system capacity" (i.e., "pumps and pipes" certificates) to issuing certificates based on actual "beneficial use" of water. *See id.* at 598–601. Despite the fact that the "pumps and pipes" "method [had] been used by the Department [of Ecology] for at

least the past 40 years, and hundreds of permits [had] been issued with pumps and pipes language[,]" the Court looked to and applied the relevant statutes and case law, and determined that certificates must be issued based on "beneficial use." *Id.* at 587, 598–601. Consistent with the Supreme Court's approach in *Theodoratus*, this Court should look only to the statutory language in RCW 90.44.050 to determine the scope of the permit exemption, rather than giving weight to any single position taken by Ecology or its predecessor agency.

Appellants also point to a summary of past adjudications in the state in which stock-watering rights were confirmed with quantities less than, or "not to exceed," 5,000 gallons a day. CP 651-763. This summary and the attached documents, however, lack any indication that the water right claimants involved sought confirmation of stock-water groundwater rights in amounts greater than 5,000 gallons a day. There is also no indication that any of the superior courts that conducted these adjudications considered this question as a contested issue. Therefore, these rulings are of no precedential value here. [13]

[13] There is a factual reason why these courts very possibly were not presented with the question in a contested setting. The adjudications that were the subject of the reports and decrees covered relatively small geographic areas. *See* names of basins covered at CP 655-656. Claims to stock-water rights larger than 5,000 gallons a day would not have been asserted in these adjudications if there was no stock operation using more than 5,000 gallons a day in those areas.

D. Groundwater Code Policies Support The Superior Court's Interpretation

1. An exemption from permitting for stock-watering uses is not inconsistent with policies that require permits for some uses while exempting certain specified uses from the permit requirement.

Appellants suggest that an unrestricted permit exemption for stock-watering is inherently inconsistent with the general policy of requiring permits for the use of the state's water resources. Appellants cite the rationale for water resource regulation as ensuring "an adequate water supply, fairly distributed and efficiently-used, for a growing population." Appellants' Br. at 3-4 (citing RCW 90.03 *et seq.*). Appellants also note that the Supreme Court in *Campbell & Gwinn* recognized the purposes underlying the Groundwater Code as including protecting existing rights, the public interest, and the resource as a whole. Appellants' Br. at 19 (citing 146 Wn.2d at 16).

The state agrees that these are among the important purposes of the statute. The state also agrees that permitting of new water uses provides a valuable tool for efficiently and fairly distributing and protecting the resource.[14] However, the Legislature has not mandated permits for every use of groundwater. The Legislature's exemption from the permit

[14] Permitting of new groundwater uses involves consideration of water availability, impairment to other water rights, and potential impacts to the public interest. RCW 90.44.050; RCW 90.03.290.

requirement for certain small uses indicates that the Legislature has concluded that, for certain types of water use, the benefit of requiring a permit is outweighed by the costs. Thus, to implement the policies described by Appellants, including promoting fair distribution and efficient use of ground-water, the 1945 Legislature decided to streamline the establishment of certain small uses of groundwater by exempting them from the permit process.

The policy question in this case, thus, is not whether any exemption from permitting is consistent with the policies underlying the statute, but whether an exemption from permitting for stock-water use that does not contain a quantity or type of use limit is consistent with the Groundwater Code's policies, including those policies that recognize that establishment of new small groundwater uses should be streamlined and involve minimal time and expense. Not only is such an exemption consistent with the Code's policies, it is also rationale and understandable, particularly because the amount of water associated with stock-watering is a fraction of the amount used for other purposes.[15]

[15] When compared to irrigated agriculture, whether on a statewide volume basis or on an operation to operation basis, stock-water withdrawals (even without a quantity or type of use restriction) can be characterized as small. *See* note 8 *supra* p. 21.

2. Permit-exempt uses are considered water rights and are part of the water right priority system. If they impair a senior water right, they may be restricted and Ecology may prevent their establishment if a particular basin's water supply is threatened.

Appellants translate the absence of a quantity limit in the permit-exemption statute to their oft-repeated and incorrect statement that stock-watering rights are "unlimited." Like all other water rights, permit-exempt stock-watering rights are limited to the quantity of water necessary to supply the purpose of the right. *Grimes*, 121 Wn.2d at 468. For stock-water withdrawals this means the reasonable amount of water necessary for animal drinking and for the maintenance of animal health and welfare. *See* Section III.A., *supra* at 2-3.

Moreover, stock-water rights established as permit-exempt uses are subject to the water rights priority system and watershed basin rules. *See* RCW 90.44.050 (the right associated with a permit-exempt withdrawal is "equal to that established by a permit issued under the provisions of this chapter."); *Campbell & Gwinn, LLC,* 146 Wn.2d at 1, 9; Op. Att'y Gen. 6 (2009), at 13; Op. Att'y Gen. 17 (2005), at 1-2, 4-5. This means that in a water short basin, a senior right has priority over a junior right, whether such junior right was established by permit or through a permit exemption. If a senior right is impaired by exercise of a junior right, the senior can pursue judicial relief against the junior. *See, e.g., State ex rel. Roseburg v.*

Mohar, 169 Wash. 368, 375, 13 P.2d 454 (1932). Moreover, Ecology may close to new appropriations, or withdraw from further appropriation while the agency obtains additional information, a particular water body that cannot support new water uses. *Postema*, 142 Wn.2d at 80-98; RCW 90.54.050(2). Ecology's authority to close and withdraw particular water bodies from new appropriations extends to groundwater bodies in hydraulic continuity with surface water bodies and to both permitted and permit-exempt uses. Op. Att'y Gen. 6 (2009), at 12-13.

Accordingly, Appellants' characterization of permit-exempt stock-watering use as unlimited or outside the scope of any control or regulation should such use cause impairment to senior water right holders or threaten specific groundwater supplies is unfounded.

VI. CONCLUSION

The court should affirm the superior court and rule that RCW 90.44.050 does not limit permit–exempt withdrawals of public

groundwater for stock-watering purposes to 5,000 gallons a day or to only those uses associated with rural homesteads.

RESPECTFULLY SUBMITTED this 8th day of September, 2010.

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